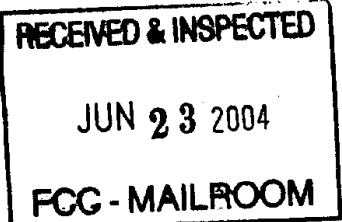


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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.



In the Matter of) MM Docket No. 99-331
Amendment of Section 73.202(b)) RM-9848
Table of Allotments)
FM Broadcast Stations)
(Madisonville, and)
College Station, Texas))

To: Assistant Chief,
Audio Division
Media Bureau

ORIGINAL

REQUEST FOR WAIVER

On November 19, 1999, a Notice of Proposed Rulemaking (DA 99-2564) was issued in this proceeding and on January 10, 2000, a "Comments and Counterproposal" was filed by Garwood Broadcasting Company of Texas ("Garwood"). The Garwood Counterproposal was subsequently published by the Commission on April 11, 2000, in Public Notice Report No. 2402. On January 21, 2003, the Chief of the Audio Division of the Media Bureau issued a Report and Order (DA 03-144) which denied the Garwood Counterproposal. A Petition for Reconsideration of that action was subsequently filed by Garwood on February 20, 2003, and remains pending at this time.

At the time of filing of the Garwood Counterproposal it proposed two new first transmission services (in the towns of Garwood and Sheridan, Texas) but to do so it included as an essential part, a "backfill" proposal which would have temporarily removed an existing station in Palacios, Texas, which is its present sole transmission service. The channel at Palacios

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would be replaced by an equivalent channel for which Garwood was fully committed to apply and operate. This procedure, fully consistent with FCC policy at the time of filing and for the several years thereafter that the proposal was pending, was referred to as a "backfill" process.

On February 11, 2003, the Commission issued a Memorandum, Opinion and Order in Pacific Broadcasting of Missouri, 18 FCC Rcd 2291 (2003), and in the course of denying an STA requested by Pacific in that proceeding, went on to also indicate its unhappiness with the existing backfill policy and directed the staff to "immediately cease this practice". As there was some measure of uncertainty as to what effect was intended by this change of policy upon existing cases, Garwood and others on March 13, 2003 requested Reconsideration and Clarification from the Commission.

As the Commission acted on June 16, 2004, denying all requested relief and indicating that the new backfill policy would apply to everyone, no matter what their position, and directing the staff "in the ordinary course" to dismiss any petition, counterproposal, or existing Notice of Proposed Rulemaking that is inconsistent with the new backfill policy, and indicating that the only possible relief from application of this new restrictive policy upon existing petitioners would be by way of individual waivers, Garwood herewith requests such a waiver in this case. In support whereof, the following is submitted:

I. Procedural Basis for Waiver

The first thing that we feel must be noted is the fact that the petitioner here filed its Counterproposal in good faith on January 10, 2000, and at that time the proposal was fully consistent with applicable FCC rules and policies including those governing backfill proposals. At that time, the backfill procedure had been proposed and approved by the Commission in a number of cases. ^{1/} It is obvious and it is reasonable that in filing its counterproposal in January of the year 2000, and in prosecuting its proposal over subsequent years, Garwood fully relied upon and complied with the Commission's long-standing existing backfill policy.

The point is that in considering this request for waiver, we believe that the good faith reliance of Garwood upon FCC rules and policies in filing its Counterproposal and in waiting for a decision on that Counterproposal for over three years is a relevant factor to be considered as part of the waiver request. To the extent that a new backfill policy is adopted after that long period of time where the counterproposal was pending, retroactive application of that new policy is a practice that should be avoided if at all possible.

^{1/} See for example Rangely, Silverton and Ridgway, Colorado, 15 FCC Rcd 18266 (2000); Refugio and Taft, Texas, 15 FCC Rcd 8497 (2000); Llano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997), recon den, 13 FCC Rcd 25039 (1998); Althion, Lincoln and Columbus, Nebraska, 8 FCC Rcd 2876 (1993), aff'd. 10 FCC Rcd 11931 (1995), rev. den., sub nom. Busse Broadcasting Corp. V. FCC, 87 1456 (DC Cir 1996).

As recognized by the D.C. circuit of the U.S. Court of Appeals in Yakima Valley Cablevision v. FCC, 794 F.2d737 at 745 (D.C. Cir 1986):

Indeed, courts have long hesitated to permit retroactive rule making and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.

The same court noted earlier that an Agency's action applying a new rule that penalized conduct which was permissible at the time the party had acted "raises judicial hackles" Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d, 380 (DC Cir 1972), and so it should since it has the obvious appearance of being utterly unfair.

In our case, the protracted period of time (over three years) which elapsed from the time that Garwood filed its Counterproposal to the time that the Commission decided to change the policy would also appear to be an additional unique relevant factor which should be considered as part of the waiver request.

II. Substantive Basis for Waiver

A. Provision of Two New First Services.

The overall public interest would be best served by waiver of the rule and adoption of the Garwood proposal. The most basic elements of the Garwood proposal are that it would bring a first service to two new communities (a new class A station to Garwood, Texas, and a new Class C3 station to Sheridan, Texas), and to do

so would require only the temporary removal of the existing transmission service at Palacios, to be replaced by application and operation of a new station there on an equivalent replacement channel as committed by Garwood. The fact that this use of a backfill replacement channel would pave the way for two new first services is another unique element of the instant case and a further reason to waive application of the new backfill policy

B. Initiate Use of a Previously "Warehoused" Channel.

Finally, the most unique element in the instant case is the Garwood's proposed utilization of a channel that has been warehoused, unused and unavailable to anyone else to use, in Bay City for the past 13 years. A full discussion of this point is included in Garwood's pending Petition for Reconsideration as filed on February 20, 2003, and we will not burden the record by repeating those points here except to note again that it was in the public interest for Garwood to seek use of that fallow channel and that has not changed.

Moreover, the Commission has recently acted in another similar case (with far less egregious "warehousing" than in the instant proceeding) and has taken a course there that is fully consistent with what Garwood has proposed to do here. See Amendment of FM table of Allocations, Susanville, Quincy, and Corning, California, Notice of Proposed Rulemaking and Order to Show Cause, DA 04-1198, released May 4, 2004, at paragraph 3. As suggested by Garwood in its Petition for Reconsideration, it is the policy of the Congress that scarce FM frequencies should not

be "warehoused", unused, and blocked from use by other parties, and where that occurs, the original person controlling the unused frequency should not be "rewarded" for having done so. Again, the full details of the warehousing which has taken place with the channel in Bay City, Texas, is fully described and documented in the existing record of this case.

Suffice it to say here that the use of channel 273C1 was requested by Margaret Sandlin, the licensee in Bay City, Texas, then operating on 273C2, in the year 1991. In that same year, the commission granted the request and upgrade use of channel 273C1. Sandlin then subsequently filed for a construction permit which was dismissed as deficient in August of 1992, then refiled a new application which was granted in May of 1993.

That is pretty much "the end". Sandlin did nothing with the construction permit, requested no extension, offered no explanations, and the construction permit simply lapsed, with the FCC recognizing that fact by letter dated January 12, 1995. Channel 273C1 remained unused and with no interest shown until Garwood filed to make use of it in January, 2000. It remains unused today. That is a total of 13 years after Sandlin asked for it and committed to make use of it.

III. Summary and Conclusion

In sum, Garwood submits that the unique elements of its case, including the three years that elapsed from the time Garwood filed to the time the FCC changed its backfill rules; the

fact that adoption of the Garwood proposal would result in two new local services, at the cost of one temporary backfill disruption at Palacios; and the public interest in Garwood making use of a channel warehoused for 13 years and left unused and utterly wasted during that time, define a public interest benefit far more than sufficient to justify the waiver of the new backfill policy as it would apply to Garwood in this case.

And there can be no doubt that it is appropriate to consider waiver in this case. The Commission itself in adopting an interpretation of its new backfill policy which could only be seen as very strict and also very broad in application, at the same time recognized that even in those stringent circumstances, the staff must give a hard look at the unique circumstances before them in an individual case, to consider whether the new policy does or does not serve the intended purpose in that case, does or does not serve the public interest in that case, and, if not, whether it should be waived. That is not just the "right" thing to do or just the "logical" thing to do. As recognized by the Commission, that is the reasonable expectation of the Federal Courts. See Storer Broadcasting v. FCC, 351 U.S. 192 (1956) Wait Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir, aff'd 459 F.2d 1203 (1972) cert denied, 409 U.S. 1027 (1972)). See also the further supporting citations cited by the Commission at footnote 59 of Pacific.

It is submitted that the unique circumstances present in this case, the three year period the counterproposal was pending,

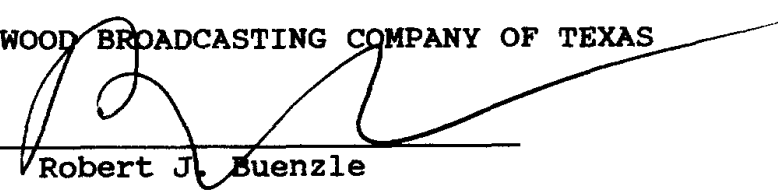
the two new local first services which would result, and the importance of returning a channel previously warehoused unused for 13 years, which would be the result of Garwood's efforts and as would be the case if Garwood's counterproposal were adopted, all form a substantial basis demonstrating that the public interest would be best served by waiver of the new backfill policy in this case and by adoption of the Garwood counterproposal

Wherefore, for the reasons set forth above, Garwood submits that waiver of the new backfill policy in this case would be in the public interest, and respectfully requests that the new backfill policy be waived, Garwood's Petition for Reconsideration granted, and the Garwood counterproposal adopted.

Respectfully submitted,

GARWOOD BROADCASTING COMPANY OF TEXAS

by


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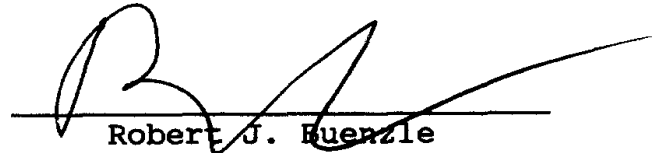
June 23, 2004

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Request For Waiver have been served by United States mail, postage prepaid this 23rd day of June, 2004, upon the following:

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